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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

ALTHEUS RICHARDSON, ET AL.,

Petitioners,

vs.

UNITED STEEL WORKERS OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. A group of men represented by a Labor Union sued the Union under Texas Law for simple negligence in the advice it gave them about whether to go on strike. The Court below held that such a State action was preempted by the Union's Federally imposed duty of fair representation. Was this error?

2. The Court below based its decision on the preemption doctrine announced by this Court in *Vaca v. Sipes.*[1] Should the holding of that case be limited to the facts of that case, or should it be extended to all disputes where members of a bargaining unit contend that their Union has caused them damages through negligence?

3. In *Del Costello v. Teamsters,*[2] *and International Brotherhood of Electrical Workers, AFL-CIO v. Hechler,*[3] this Court held that Section 301 of the LMRA does preempt the field of any State claim, which would require analysis or interpretation of a collective bargaining agreement. Where no such agreement is involved, should the Federal duty of fair representation nevertheless be preemptive?

4. The Court below held that the preemption in this case was total, so as to support removal jurisdiction. Was this error?

5. After the suit in this case was filed, several persons sought to intervene as Plaintiffs, asserting claims

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[1] 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967)

[2] 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 467 (1983)

[3] ___U.S.___, 107 S.Ct., 2161, 95 L.Ed.2d 791 (1987)

against Defendant identical to those asserted by the original Plaintiffs. The District Court denied them Leave to Intervene, and the Court of Appeals affirmed. Was this error?

LIST OF PARTIES

(1) The fifty five Plaintiffs [Appellants below, Petitioners herein]: Altheus Richardson, Jose Acuna, Armando Alvarez, Manuel Amaro, Gonzalo Ayala, Lorenzo Ballesteros, Miguel Bejarano, Felix Benavidez, Eugenio Campa, Juan Carrasco, Richard Chavez, Onesimo Cordova, Jose De La O, Albert Dominguez, Jr., Ricardo Dominguez, Sr., Juan Elixavide, Ramon Fierro, Martin Galaviz, Sergio Gallardo, Jesus Garcia, Robert Gomez, Arturo Gutierrez, Roberto Gutierrez, Lorenzo Hernandez, Lorenzo Hinojos, Neponuceno Hinojos, Robert Holguin, Jesus Jaime, Pedro Jaime, Max Marquez, Antonio Martinez, Damian Martinez, Manuel Martinez, Raymundo Martinez, Roberto Martinez, Gabriel Mejia, Carlos Mellado, Antonio Artiz, Manuel Peralta, Rudy Rey, Jesus Reynaud, Raul Reynaud, Frank Rivera, Victor Rubalcaba, Roberto Saenz, Regulo Sias, Alfredo Soto, Miguel E. Soto, Fernando Spencer, Juan Tarango, Ricardo Valdivia, Armando Valenzuela, Inez Yandez, Ernesto Garcia, and Carlos Lopez.

(2) The fourteen would-be Intervenors [Appellants below, Petitioners herein]: Gilberto Miranda, Antonio R. Martinez, Jr., Juan Moreno, Leon Palomino, Juan Mejia, Mario San Miguel, Alfonso Castillo, Jose G. Contreras, Antonio Campa, George Castaneda, Blas Hermosillo, Raymundo Casillas, Guillermo Reza, and Francisco Gonzalez.

(3) Defendant United States Steelworkers of America, AFL-CIO-CLC, [Appellee below, Respondent herein].

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No. _____

In The

Supreme Court of the United States

October Term, 1988

ALTHEUS RICHARDSON, ET AL.,

Petitioners,

vs.

UNITED STEEL WORKERS OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Altheus Richardson, and others, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 8, 1989.

OPINION BELOW

The opinion of the Court of Appeals for Fifth Circuit is reported at 864 F.2d 1162 (1989). The text of the opinion appears in the appendix at *Richardson* v. *United Steel Workers of America*, (No. 87-1875 5th Cir. Feb. 6, 1989). No

opinion was issued on denial of petitioner's Motion for Rehearing. A copy of that order also appears in the appendix.

JURISDICTION

The Judgment herein is dated February 6, 1989, and was entered the same day. Petitioners made a timely Motion for Rehearing, with suggestion of rehearing en banc, which the Court overruled on March 8, 1989. The statutory provision believed to confer on this Court jurisdiction to review the Judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1254, subparagraph (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. U. S. Constitution, Art. VI (West 1987): "this Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Section 9(a), Labor Management Relations Act, 29 U.S.C. Section 159(a): "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective

bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . "

3. Section 301, Labor Management Relations Act, 29 U.S.C. Section 185(a): "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce may be brought in any District Court of the United States having jurisdiction of the parties . . . "

4. Rule 24(b), Federal Rules of Civil Procedure, upon timely application any one may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law and fact in common. . . . in exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT OF THE CASE

The relevant facts are correctly summarized in the opinion of the United States Court of Appeals for the Fifth Circuit, reproduced in the appendix and reported at 864 F.2d 1162. Basically, the original 55 Plaintiffs filed suit in a Texas State Court, alleging that they all lost their jobs at Phelps Dodge Refining Corporation's El Paso Works, as a result of negligence on the part of United Steel Workers of America, which acted as their bargaining agent, in failing to give them certain advice about the rights which their employer had in a pending labor dispute. From the face of the petition, it was clear that the

cause of action had accrued more than six (6) months, but less than two (2) years, before suit was filed.

The union removed the case to Federal Court, contending that it was a "fair representation" case and that it should be barred in accordance with the six month limitations period prescribed by this Court in *Del Costello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The union moved to dismiss the case on that ground, and the Plaintiffs countered with a Motion to Remand the Proceedings to State Court, contending that this was a straight negligence suit, arising under Texas Law only.

While the Motions for Dismissal and Remand were pending, 14 additional persons sought to intervene, asserting that they were also ex-employees of Phelps Dodge with identical claims against the Steel Workers Union.

Eventually, the District Court ruled in favor of the union, holding that Plaintiffs had "stated a claim for breach of the duty of fair representation," which "arose in the context of a collective bargaining agreement." Accordingly, the District Court denied Plaintiffs' Motion to Remand and dismissed the case as time-barred, based upon the six month limitations period prescribed by *Del Costello* v. *International Brotherhood of Teamsters*, supra.

In its original Order of Dismissal, the Court did not adjudicate the claims of the intervenors. In subsequent filings, both parties urged the Court to permit the petitions in intervention and adjudicate those claims as well. Despite such agreement, the Court denied the requests to intervene.

Petitioners contend that the District Court lacked the jurisdiction to do anything but remand the cause to State Court. The jurisdictional basis relied upon by the District Court and affirmed by the Court of Appeals was 29 U.S.C. Section 159(a), 28 U.S.C. Section 1331, and 28 U.S.C. Section 1337.

Additional discussion and analysis of this case's procedural history is contained in the following section.

ARGUMENT

What makes this case so important and worthy of consideration by this Court is that it decides, in favor of labor unions, whether the States may hold such organizations responsible to the people they represent for acts of simple negligence and apply States Statutes of Limitation, which are generally longer than the six months allowed for Federal fair representation suits.

When men and women lose their jobs because their union is careless in the advice it gives them about whether to engage in a strike, it is clear that Federal Law provides no remedy. That was the holding in *Swatts* v. *United Steel Workers of America*, 808 F.2d 1221 (7th Cir. 1986), and that is how the Court of Appeals indicated that it would have decided this case, had Petitioners brought it in Federal Court as a fair representation case within the six month limitations period. Slip opinion, p. 1745, n. 5. As the Court said in *Swatts*, for Plaintiff to show a breach of the fair representation duty, he must have evidence "of intentional, invidious, affirmative misstatement." 808 F.2d at 1225. Making this very limited duty preemptive of

any possible remedy under State Law effectively exempts Labor Unions from any of the legal consequences normally associated with negligence in all of the States. That is a very important decision, and it goes far beyond the prior decisions of this Court.

In general, this Court has found preemption of suits against labor organizations in two different contexts: first, where the State Court action would be disruptive of labor management relations, and, second, where the State Court suit would require analysis or interpretation of the terms of a collective bargaining agreement.

The first type of preemption (to prevent disruption of labor management relations) goes back to *Vaca* v. *Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), cited by the Court of Appeals as the basis for its decision in this case. The worker in that case sued the union for refusing to take to arbitration a dispute about his physical ability to return to work after an illness. In that context, this Court held that fair representation was the union's only duty to the worker and that it would afford relief only if the union's conduct towards the member was arbitrary, discriminatory, or in bad faith. However, this Court emphasized that such a harsh result for the employee is based upon the union's need for broad latitude in this area, so that agreements and accommodations between the union and employer could not later be upset by a Judge or jury. 386 U.S. at 189 – 194, 87 S.Ct. at 916 – 918, 17 L.Ed.2d at 856 – 860.

More recently, this Court has resolved preemption issues on the basis of whether the State Law claim would

require analysis or interpretation of a collective bargaining agreement. See, e.g., *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); and *International Brotherhood of Electrical Workers, AFL-CIO* v. *Hechler*, ___ U.S. ___, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987). In those cases, this Court has given preemptive force to the provisions of Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a), which gives Federal Courts jurisdiction over suits to enforce collective bargaining contracts and has repeatedly emphasized the importance of uniformity of contract interpretation and the chaos in labor relations to be expected without such uniformity.

Following the Supreme Court's lead, State and lower Federal Courts have been holding that State Court actions are not preempted where resolution of the State case does not require analysis or interpretation of a collective bargaining agreement. See, e.g., *Ackerman* v. *Western Electric Company*, 860 F.2d 1514 (9th Cir., 1988); *Krasinski* v. *United Parcel Service*, 530 N.E.2d 468 (Ill. S.Ct., 1988); and *Merchant* v. *American Steamship Company*, 129 L.R.R. 359 (6th Cir., 10/15/88). The Court of Appeals decision in this case is very much against that trend and is the only recent decision to base preemption on *Vaca* v. *Sipes*.

It is somewhat interesting to note that preemption in the context of this case is so controversial that the union successfully urged the District Court to avoid even mentioning it. At the District Court level, there was a lot of discussion of the Section 301 *Allis-Chalmers* type of preemption, and the District Court, in an obvious attempt to

make the collective bargaining agreement somehow relevant, stated that "Plaintiffs' claim against Defendant certainly arose in the context of a collective bargaining agreement." On appeal, other counsel for the union was more than willing to say the dreaded "P" word and successfully urged the Court of Appeals to extend the holding of *Vaca* v. *Sipes* far beyond the policy context which this Court had found so important. The Court of Appeals did not attempt to find any remote connection between petitioner's claim and a collective bargaining agreement. On the contrary, they conceded that the petitioners had not pled any claim cognizable under Section 301. Slip op., p. 1747. But by grounding its preemption doctrine on *Vaca* v. *Sipes*, the Court of Appeals rendered a decision of great significance, which this Court should undertake to review.

If petitioners in this case had gotten their advice about whether to strike from a lawyer, rather than the union, the lawyer would have clearly had a duty to use due care in what he told petitioners and in what he chose not to tell them. If it turned out that the lawyer's advice was carelessly given and caused petitioners to lose their jobs, they would have certainly had a remedy against the lawyer under State Law. Being answerable in that way is one of the things that makes lawyers careful about the advice they give. What the Court of Appeals has done in this case is to place labor unions beyond the reach of such accountability for their actions. And the Court of Appeals did this without any controlling precedent from this Court and certainly without any mandate from Congress.

What is it about unions, that they should be any less accountable for their negligence than lawyers, accountants, physicians, dentists, or any one else who undertakes to give advice to another in matters of critical importance? The Court of Appeals did not answer that question, acting as though this Court had already done so in *Vaca* v. *Sipes*. But because of the great factual disparity between this case and *Vaca*, what was said there should not be regarded as controlling here. If a union has no legally enforceable duty of care in the advice it gives, in any context, then it is this Court that should say so.

Another important and controversial feature of the Appellate Court resolution of this case is its holding that the preemption in this case is total, so as to permit removal of the case from State Court to Federal Court. On this point, the Court of Appeals stated rather clearly that they were making new law. They pointed out that, in Section 301 cases, the preemption is total, under the doctrine announced by this Court in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). The Court of Appeals struggled in its discussion of the appropriateness of extending that principle to fair representation cases, characterizing this "a jurisdictional question that does not lend itself to simple solutions." But the Court of Appeals need not have puzzled over that particular aspect of the case, because it had already ruled that the preemption doctrine of *Vaca* v. *Sipes* would be applied to the facts of the case before it. *Vaca* v. *Sipes* was a total preemption case, and so, in any case where it applies, State law is totally preempted and the cause is removable. What is instructive about the Court of Appeals' difficulty with this issue

is that it shows, once again, that extending the holding of *Vaca* v. *Sipes* to this case is a quantum leap in the law of labor relations, something more than worthy of this Court's careful attention.

Interestingly, the Court of Appeals itself hinted broadly that the preemption in this case was not total. On four different occasions in the opinion, the Court suggested that there would have been a different result, had petitioners alleged that they were members of the union and that the union owed them a duty of due care because of that relationship, rather that its status as their bargaining agent. If a simple change like that in the complaint would be sufficient to avoid preemption, then how can the preemption be total?

Finally, the decision of the Court of Appeals establishes a completely unreasonable precedent on the subject of intervention. The fourteen men who sought to intervene after the case was filed all asserted identical claims against the same defendant. All of the petitions in intervention were filed before any discovery had been done in this case and before the case was even set one time on the District Court's docket. Permitting the fourteen intervenors to participate in the case would have occasioned no delay in the trial, and indeed, at the trial level, counsel for Defendant urged the Court to grant leave to intervene and decide the claims of intervenors in the same way that it decided the claims of the main Plaintiffs. Nevertheless, the Court refused to permit the interventions, and on appeal, the union did another flip flop and said that the District Court was right to deny leave to intervene.

The Court of Appeals pointed out that permissive intervention is "wholly discretionary" and will be overturned only in "extraordinary circumstances," citing *New Orleans Public Service* v. *United Gas Pipeline*, 732 F.2d 452 (5th Cir. en banc 1984). But where the claims of intervenors arise from the exact same facts as those of the main Plaintiffs, where granting leave to intervene would occasion no delay in the proceedings, and where none of the other parties object, but the District Court nevertheless denies leave to intervene and leaves those claims unresolved, it would seem that extraordinary circumstances are present. The Court of Appeals seems persuaded by the fact that Intervenors would have received no relief, even if the Court had allowed them to intervene. Slip op., p. 1750, n. 9. Be that as it may, the Court of Appeals decision in this case seems to be good authority for the proposition that a District Court decision concerning intervention will never be upset, no matter what the circumstances. That is not good law, and it should not stand.

CONCLUSION

It is respectfully submitted that, for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Altheus RICHARDSON, et al.,
Plaintiffs-Appellants,

Gilberto Miranda, et al., Appellants.

v.

UNITED STEELWORKERS OF AMERICA,
Defendants-Appellees.

No. 87-1875.

United States Court of Appeals,

Fifth Circuit.

Feb. 6, 1989.

Former employees brought action in state court against union alleging that union had duty to advise them of employer's right to replace employees if they went out on strike and that union breached that duty. Case was removed to federal court. The United District Court for the Western District of Texas, Harry Lee Hudspeth, J., held that action was time barred. Former employees appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) claim was a federal duty of fair representation claim under National Labor Relations Act over which district court had removal jurisdiction, and (2) claim was time barred.

Affirmed.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, GARWOOD, and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge:

The plaintiffs-appellants in this case are former employees of Phelps Dodge Copper Refinery in El Paso, Texas (Phelps Dodge) who were replaced while on strike. Defendant-appellee United Steelworkers of America, AFL-CIO-CLC (the Union) was their collective bargaining representative. Plaintiffs sued the Union in state court for alleged breach of its duty as their bargaining agent by failing to warn them of Phelps Dodge's statutory right to replace them. The Union removed the case to federal court and several other former employees sought leave to intervene. The district court determined that it had subject matter jurisdiction over the case, denied the motions for leave to intervene, and dismissed plaintiffs' action as time-barred by the six-month federal statute of limitations for federal duty of fair representation claims, section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b). We affirm.

Facts and Proceedings Below

Plaintiffs filed this action against the Union in Texas state court on Monday, April 6, 1987, alleging in their original petition that:

> "Between July 1, 1983, and April 5, 1985, *Defendant acted as bargaining agent for Plaintiffs* in connection with their employment by the Phelps Dodge Refinery in El Paso, Texas. *As the bargaining agent for Plaintiffs, Defendant had a duty* to advise them of measures which their employer could, and in reasonable probability would, take, should members of the bargaining unit (including Plaintiffs and others) either vote to reject their employer's final offer or vote to go out on strike. Among the employer's rights in this dispute was the right to put into effect its final offer after bargaining to impasse, and to hire permanent

> replacements in the event of a strike. Defendant, without legal justification or excuse, failed to advise plaintiffs that their employer had these rights. Thereafter, the employer exercised these rights, and all Plaintiffs were permanently replaced by the employer. Had Plaintiffs known that their employer had the rights which it in fact had, they would have either persuaded the other members of the bargaining unit to vote in favor of the employer's final offer, and if that had failed, then Plaintiffs would have accepted the final offer individually.
>
> ". . . .
>
> "The cause of action herein accrued on the 5th day of April, 1985, when Defendant informed Plaintiffs that Defendant no longer represented them. . . ." (Emphasis added.)

Plaintiffs' original petition does not allege that plaintiffs are or ever were members of the union. And, this pleading does not expressly mention or refer to any federal of state statute, regulation, or court decision, nor does it expressly refer to federal or state law or expressly identify the jurisdiction the law of which it seeks to invoke.

The Union was served with plaintiffs' state court original petition on May 6, 1987 and on May 20, it removed the case to the United States Court for the Southern District of Texas pursuant to 28 U.S.C. § 1441 on the basis of jurisdiction under section 301 of the NRLA, 29 U.S.C. § 185(a) (jurisdiction of the district court over suits for violations of collective bargaining agreements). The Union then moved to dismiss plaintiffs, action as time-barred under the six-month limitations period of section 10(b) of the NLRA, 29 U.S.C. § 160(b), asserting that the plaintiffs' action was actually for breach of its

duty of fair representation under the NLRA, though Plaintiffs had not pleaded the NLRA as the basis for their state action. On May 26, plaintiffs moved to remand and filed a response to the Union's motion to dismiss, contending that their claim was for negligent breach of a Texas common-law tort duty owed by a union to its members and that either the Texas four-year, or two-year, statute of limitations applied. On May 29, the Union moved to amend its petition for removal, and tendered an amended removal petition alleging federal jurisdiction based on 29 U.S.C. § 159(a) (bargaining representative for majority of unit members shall be exclusive representative for unit), 28 U.S.C. § 1331 (original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States"), and 28 U.S.C. § 1337 (jurisdiction over civil actions "arising under" federal laws regulating commerce). The district court granted leave to file the amended removal petition, noting that since it was tendered within the original thirty-day period provided by 28 U.S.C. § 1446(b) the amendment should be allowed. *See* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3733 at 537 (2d ed. 1985).

While the respective motions to dismiss and to remand were under submission, fourteen additional ex-employees of Phelps Dodge moved to intervene, asserting they had identical claims.

The district court ultimately agreed with the Union's analysis of plaintiffs' claim, finding that plaintiffs had "stated a claim for breach of the duty of fair representation," which "arose in the context of a collective bargaining agreement." Based on this conclusion, the district court denied plaintiffs' motion to remand; applied the

six-month limitations period of section 10(b) of the NLRA prescribed by *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), for duty of fair representation claims, and dismissed plaintiffs' claims as time-barred. It also denied the motion for intervention.[1] This appeal followed.

Discussion

Plaintiffs alleged that the Union had a duty to advise them of Phelps Dodge's right to replace them if they went on strike. They alleged that this duty arose from the Union's status as their collective bargaining agent (and their original petition asserts no other source of this duty). The Union's right to act as plaintiffs' bargaining agent is conferred by the NLRA, and we hold that the duties corresponding to this right conferred by federal labor law are likewise defined solely by federal labor law. As a result of this complete preemption of state law, we further hold that the district court had removal jurisdiction over these actions. Finally, we find that the district court did not err in denying the motion to intervene.

The Duty of Fair Representation and Preemption

Plaintiffs simply alleged that the Union was "the bargaining agent for Plaintiffs" and that it "acted as bargaining agent for Plaintiffs in connection with their

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[1] The district court initially granted the Union's motion to dismiss without explicitly ruling on plaintiffs' motion to remand. The court subsequently entered an amended order of dismissal that denied the motion to remand.

employment by" Phelps Dodge. Taken in the context of plaintiffs' original petition as a whole, these statements clearly imply that the Union was the exclusive bargaining agent under the NLRA for the collective bargaining unit of which plaintiffs (and the putative intervenors) were members, and the subsequent briefs and motions of all parties, here and below, in fact treat the Union as such. The duty which the Union allegedly breached is described in the original petition as "a duty" which the Union had *"[a]s* the bargaining agent for Plaintiffs" (emphasis added). No other source of duty is alleged in the original petition. The nature of the relationship between a collective bargaining agent and the employees in the bargaining unit is well established:

> "Sections 8(b) and 9(a) of the Labor Management Relations Act, 29 U.S.C. §§ 158(b), 159(a), empower a union that represents a majority of the employees in an appropriate bargaining unit to act as the exclusive representation of all the employees in collective bargaining. Because the union acts as agent of all the employees, it owes each of them, whether or not a union member, the duty of fair representation. . . . The scope of this duty was outlined in *Vaca v. Sipes,* 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850 (1967). The Supreme Court there held that, when a union acts as the collective bargaining agent of its members, it is obliged 'to secure the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct.' *Id.* at 177, 87 S.Ct. at 910, 17 L.Ed. at 850." *Bass v. International Broth. of Boilermakers,* 630 F.2d 1058, 1062 (5th Cir.1980).

See also In re Carter, 618 F.2d 1093, 1104 (5th Cir.1980), *cert. denied sub nom. Sheet Metal Workers' Intern. Ass'n v. Carter*, 450 U.S. 949, 101 S.Ct. 1410, 67 L.Ed.2d 378 (1981).

This duty of fair representation generally governs a union's conduct vis-a-vis the bargaining unit members when the union is representing them.[2] *See Swatts v. United Steelworkers of America*, 808 F.2d 1221, 1224 (7th Cir.1986) (applying NLRA duty of fair representation to determine

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[2] We do not find *Smith v. Local 25, Sheet Metal Workers Int. Ass'n*, 500 F.2d 741, 750 (5th Cir.1974), or *Bass*, 630 F.2d at 1062-63, inconsistent with this statement. *Smith*, upon which *Bass* relied, stated: "A [duty of fair representation] breach occurs only when a union's dealings with the employer, ostensibly on behalf of a member of the bargaining unit, show that the union's conduct toward the member has been arbitrary, discriminatory, or in bad faith." 500 F.2d at 750. Taken out of context, this statement might suggest that the duty does not apply unless the union acts wrongfully on behalf of the employee vis-a-vis the employer. However, *Smith* merely held that suspension or expulsion from the union of a union member for failing to pay union dues was not a breach of the duty of fair representation because the union was not representing the employee "in dealings with the employer." *Cf. Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct.1909, 29 L.Ed.2d 473 (1971) (jurisdiction of the National Labor Relations Board preempts state and federal court jurisdiction where employee complains of wrongful suspension of union membership that deprived him of employment). Similarly, in *Bass* we held that the union does not owe a duty of fair representation when union conduct "affects only an individual's relationship within the union structure" and not the relationship between employee and employer. *See also International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1958).

whether defendant union liable for failure to advise plaintiffs, replaced striking unit employees, that employer could replace them); *Acri v. Intern. Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir.1986), *cert. denied*, 479 U.S. 816, 107 S.Ct. 73, 93 L.Ed.2d 29 (1986) (applying NLRA duty of fair representation to determine whether defendant union liable to plaintiffs, former unit employees of closed plant, for misrepresenting to them that proposed collective bargaining contract with employer, which employees later ratified, removed previous limits on severance pay); *Anderson v. United Paperworkers Intern. Union, AFL-CIO*, 641 F.2d 574, 576-78 (8th Cir.1981) (applying NLRA duty of fair representation to determine defendant union's liability in suit by former employees of employer which became bankrupt where union's misrepresentation that severance pay called for in proposed collective bargaining agreement was secured by "a special security fund" allegedly induced employees to ratify the agreement).

In *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), the Court further held that this federal duty of fair representation preempted state substantive law (though it did not preclude state court jurisdiction).[3] *Id.* 87 S.Ct. at 916-18. As the Court stated: plaintiff's "complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action." *Id.* at 910. The Court explained that this uniform federal standard struck the proper balance between the union's need for discretion when acting as the representative of all the bargaining unit members and the individual's right to be treated fairly.[4] *Id.* at 918. Because the plaintiffs in this case alleged that the Union

breached a duty that arose from its status as their exclusive collective bargaining agent under the NLRA, *Vaca* requires that this duty be defined by federal law. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 1920, 29 L.Ed.2d 473 (1971). We thus find no error in the district court's characterization of plaintiffs' claims as NLRA duty of fair representation claims. *See Johnson v. Intern. Union Local No. 23*, 828 F.2d 961, 967 (3d Cir.1987).[5]

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[3] The Court did not actually label this aspect of its holding "preemption," possibly to avoid confusion with the issue of whether the exclusive jurisdiction of the National Labor Relations Board over unfair labor practices preempted state and federal court jurisdiction over duty of fair representation claims under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). *Vaca*, 87 S.Ct. at 912-18.

[4] The duty of fair representation originally developed under the Railway Labor Act to protect racial minorities, who were excluded from white unions, from discrimination and thereby to prevent labor unrest. *See, e.g., Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 231, 89 L.Ed. 173 (1944).

[5] Whether the Union breached its duty of fair representation is a separate and distinct issue, which we do not reach because plaintiffs' claims are time-barred. We do note that in *Swatts*, 808 F.2d at 1224-25, the Court affirmed the dismissal on the merits of a duty of fair representation claim that was analogous to plaintiffs' claim. Whether or not a claim arises under the federal duty of fair representation law for jurisdictional purposes is, of course, a different question from whether the claim is a valid one on the merits. *See, e.g., In re Carter*, 618 F.2d at 1102-03.

We note that this case, like *IBEW, AFL-CIO v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161, 2168 n. 5, 95 L.Ed.2d 791 (1987), does not present the question of whether the Union was subject to "an independent state-law duty of care . . . arising simply from the relationship of a union to its members." Plaintiffs here allege a duty arising from the collective bargaining agent's relationship under the NLRA with the bargaining unit members, who may or may not be union members. Indeed, plaintiffs' original petition does not even allege that plaintiffs are or were members of the Union. Nor does this case involve state law actions that are not preempted because the activity complained of touches interests "deeply rooted in local feeling" or is only a "peripheral concern of the NLRA." *Lodge 76, Intern. Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Rel. Com'n*, 427 U.S. 132, 96 S.Ct. 2548, 2551-54, 49 L.Ed.2d 396 (1976); *Farmer v. United Broth. of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 1061, 51 L.Ed.2d 338 (1977). *See also Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359, 363-64 (5th Cir.), *cert. denied*, 469 U.S. 1018, 105 S.Ct. 433, 83 L.Ed.2d 359 (1984). Each state has a strong interest in protecting "the health and well-being of its citizens" and independent tort duties protecting such interests are not preempted by the NLRA. *Farmer*, 97 S.Ct. at 1065. But plaintiffs did not allege any breach of a state tort duty that exists independently of the NLRA-established collective bargaining relationship, which is the central concern of the NLRA.

Because this is a duty of fair representation case, the six-month limitations period of section 10(b) of the NLRA applies, *DelCostello*, 103 S.Ct. 2281, and plaintiffs' claims,

which were filed approximately two years after their claims arose, are therefore time-barred.

Removal Jurisdiction

The right to remove a case from state to federal court is based on the statutory grant of jurisdiction in 28 U.S.C. § 1441, which provides in pertinent part:

> "(a) . . . [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> "(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

See Finn v. American Fire & Cas. Co., 207 F.2d 113, 115 (5th Cir.1953), *cert. denied*, 347 U.S. 912, 74 S.Ct. 476, 98 L.Ed. 1069 (1954). Here, there being no allegation of diversity of citizenship, removal was proper only if the case was one which could have been originally brought in federal district court because it was founded on a claim or right arising under the law of the United States.

Because duty of fair representation claims are implied from sections 8(b) and 9(a) of the NLRA, 29 U.S.C. §§ 158(b), 159(a), which are federal laws regulating commerce, there is original federal jurisdiction of such

claims under section 1337. *In re Carter,* 618 F.2d at 1104; *Smith v. Local 25, Sheet Metal Workers Int. Ass'n,* 500 F.2d 741, 748 (5th Cir.1974); *Mumford v. Glover,* 503 F.2d 878, 883 (5th Cir.1974). When a collective bargaining *agreement* imposes a duty of fair representation, there is federal jurisdiction over a claim for breach of that duty under section 301, *In re Carter,* 618 F.2d at 1104, but when a duty of fair representation is pleaded without asserting rights under a collective bargaining *agreement,* "federal jurisdiction cannot be grounded on section 301." *In re Carter,* 618 F.2d at 1104. *See also Caterpillar, Inc. v. Williams,* 482 U.S. 386, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 (1987). Here plaintiffs sued the Union for breach of duty as their collective bargaining representative but did not plead a breach of or rights arising under a collective bargaining agreement. Thus, original federal jurisdiction must be grounded on section 1337.[6]

When determining whether plaintiffs' claim arises under section 1337, we are confronted with a jurisdictional question that does not lend itself to simple solutions. *See Powers v. South Central United Food & Commercial Workers Unions and Employers Health & Welfare Trust,* 719

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[6] Jurisdiction could presumably be grounded on section 1331 as well since section 1331's broader grant of jurisdiction over cases arising under federal laws would seem to encompass section 1337's narrower grant of jurisdiction over cases arising under federal laws regulating commerce. There is no distinction, however, between the "arising under" requirements for section 1337 and section 1331. *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 103 S.Ct. 2841, 2845 n. 7, 77 L.Ed.2d 420 (1983); *Beers v. North American Van Lines, Inc.,* 836 F.2d 910, 913 n. 1 (5th Cir.1988).

F.2d 760, 763 & n. 1 (5th Cir.1983); *Superior Oil Co. v. Pioneer Corp.*, 706 F.2d 603, 605 (5th Cir.1983), *cert. denied*, 464 U.S. 1041, 104 S.Ct. 706, 79 L.Ed.2d 171 (1984). One clear feature of the "arising under" requirement, however, is the well-pleaded complaint rule: whether a claim arises under federal law must be determined from the allegations in the well-pleaded complaint. *See generally* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3566 (2d ed. 1984). In removal cases removed, the plaintiff's well-pleaded complaint, not the removal petition, must establish that the case arises under federal law. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 3232, 92 L.Ed.2d 650 (1986); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 2847, 77 L.Ed.2d 420 (1983). This requires the court to determine federal jurisdiction only from those allegations necessary to state a claim or, stated alternatively, a federal court does not have jurisdiction over a state law claim because of a defense that raises a federal issue. *Franchise Tax Board*, 103 S.Ct. at 2846; *Gully v. First National Bank at Meridian*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Under the well-pleaded complaint rule, federal preemption is generally a defensive issue that does not authorize removal of a case to federal court. *See Powers*, 719 F.2d at 764-65.

However, in *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 1237, 20 L.Ed.2d 126 (1968), the Court held that because state law claims for breach of collective bargaining agreements were so wholly preempted by section 301 of the Labor

Management Relations Act of 1947, 29 U.S.C. § 185, that those preempted claims arose under section 301 and the federal court therefore could exercise removal jurisdiction under sections 1337 and 1441 over suits asserting such claims.[7] The Court gave little explanation in its tersely worded decision, seeming to rely primarily on *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 918, 1 L.Ed.2d 972 (1957), which held that Congress, in enacting section 301, intended for the federal courts to create a body of federal law "from the policy of our national labor laws" for the enforcement of collective bargaining agreements.

In *Franchise Tax Board*, the Court further explained *Avco:*

> "The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." 103 S.Ct. at 2853-54 (footnote omitted).

See also Eitmann, 730 F.2d at 365-66. Because section 301 preempts all state law claims that are "substantially

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[7] Although section 301 has been held to be an adequate jurisdictional grant, *see, e.g., Textile Workers Union v. Lincoln Mills of Ala.*, 77 S.Ct. at 915, the *Avco* Court found jurisdiction for cases preempted by section 301 under 28 U.S.C. § 1337.

dependent on analysis of a collective-bargaining agreement," all state suits asserting such thus preempted state law claims are removable, *Hechler*, 107 S.Ct. at 2166-67.[8]

Despite the possible implications of the broad language in *Franchise Tax Board*, *Avco* remains a narrow exception to the general rule that preemption is a defensive issue that does not authorize removal of a case to federal court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 1546-48, 95 L.Ed.2d 55 (1987), recognized a requirement of "manifest congressional intent" to make state claims preempted by federal law, other than those to which *Avco* applies, removable to federal court. *See Beers v. North American Van Lines, Inc.*, 836 F.2d 910, 913 n. 3 (5th Cir.1988). However, *Taylor*, which involved displacing preemption of a state law action by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*, did not purport to define the scope of *Avco* in instances of preemption by the NLRA. It is the scope of *Avco* in such cases that we address here.

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[8] However, an individual having rights against an employer under both a collective bargaining agreement and a separate individual contract may bring a state law claim solely on the latter so long as that claim does not require the court to interpret the collective bargaining agreement. *Caterpillar*, 107 S.Ct. at 2431.

Further, the state court clearly has concurrent jurisdiction (subject to removal in appropriate instances) over breach of duty of fair representation and breach of collective bargaining agreement cases, though the governing law to be applied is federal. *Vaca*, 87 S.Ct. at 915-16; *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962).

We hold that where the NLRA federal law duty of fair representation, actionable in federal court, preempts a state law claim, the suit asserting such a claim arises under section 1337 and may be removed to federal court just as the suit asserting state law claims preempted by section 301 of the NLRA may be removed under *Avco* and its progeny. *Avco* recognized removal based on section 301's complete, displacing preemption of state law because of congressional intent that federal (and state) courts create and administer a comprehensive body of *federal* law for the court enforcement of collective bargaining agreements. Under *Vaca*, the NLRA duty of fair representation, for the enforcement of which a federal (and state) court action is authorized, completely preempts state law because of the congressional intent that federal law, developed to further the goals of the NLRA, entirely govern the duties which an NLRA collective bargaining representative owes, by virtue of its position as such, to the workers it represents in that capacity. We cannot conceive that Congress intended complete displacive preemption of the *Avco* variety in the section 301 context, but not in the context of the duty of fair representation arising from a union's status as an exclusive collective bargaining agent under the NLRA.

We reached a similar result in *In re Carter*, 618 F.2d at 1104. There, the plaintiff brought a suit in state court against the union which was his collective bargaining representative, alleging arbitrary conduct that clearly stated a viable duty of fair representation claim although he had couched his pleadings in terms of state law. Looking to the substance of the complaint, we held that he had stated a duty of fair representation claim that could be

removed to federal court even though no rights were asserted under the collective bargaining agreement. Here, the plaintiffs, who argued in support of their motion to remand that their claim sounds in negligent breach of a state common-law imposed duty and is not governed by the federal duty of fair representation, have alleged that the Union breached the duty it owed them by virtue of its position as their exclusive collective bargaining representative. No other claim is made. While plaintiffs' original petition does not *eo nomine* expressly invoke any federal law, our analysis here, as in *In re Carter,* looks to the substance of the complaint, which under *Vaca* is necessarily federal and under *Avco* is therefore removable.

Intervention

The additional former employees who attempted to join this suit sought both intervention as of right, Fed.R.Civ.P. 24(a)(2), and permissive intervention, Fed.R.Civ.P. 24(b). Rule 24(a)(2) requires the district court to allow intervention when the applicant

> "claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Here, each applicant claimed wrongful conduct by the Union in failing to advise them of the employer's right to hire permanent replacements for them if they remained on strike, and each will have to prove his own knowledge, and reliance thereon, concerning the consequences

of a strike. This case will have no preclusive effect in any suit that they may bring. We conclude that the applicants for intervention do not have a "direct, substantial, legally protectable interest in the proceedings," as required by *New Orleans Public Service v. United Gas Pipe Line*, 732 F.2d 452, 463 (en banc), *cert. denied sub nom. Morial v. United Gas Pipe Line Co.*, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984).

As to permissive intervention, our standard of review is set forth in *New Orleans Public Service*, 732 F.2d at 470-73, which held that permissive intervention is "wholly discretionary" and will only be overturned in "extraordinary circumstances." We find no such circumstances here.[9]

Conclusion

Because plaintiffs alleged that the Union breached a duty owed them by virtue of its position as their collective bargaining agent, the district court correctly characterized their claim as a federal duty of fair representation claim under the NLRA over which it had removal jurisdiction. Under *Vaca*, the NLRA exclusively defines the duties to represented workers imposed upon a union by virtue of its status as their collective bargaining agent under the NLRA. Because these federal duties are court actionable and completely preempt any state law duties of unions to represented workers imposed by virtue of

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[9] Moreover, if the district court had granted intervention, it would have had to dismiss the would-be intervenors' claims along with the claim of each plaintiff.

the union's status as their NLRA collective bargaining agent, under *Avco* the district courts may exercise removal jurisdiction over state suits asserting such thus preempted state law claims. The district court also correctly determined that the plaintiffs' claim was time-barred under section 10(b) of the NLRA and did not err in denying intervention.

Accordingly, the judgment of the district court is

AFFIRMED.

A true copy
Test:
Clerk, U.S. Court of Appeals, Fifth Circuit

By Karen L. Comeaux
Deputy
New Orleans, Louisiana MAR 20 1989

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1875

D.C. Docket No. CA-87-170-EP
(Filed Feb. 6, 1989)

ALTHEUS RICHARDSON, ET AL.,

Plaintiffs-Appellants,

GILBERTO MIRANDA, ET AL.,

Appellants,

versus

UNITED STEELWORKERS OF AMERICA,

Defendants-Appellees.

(Filed Mar. 23, 1989)

Appeal from the United States District Court for the Western District of Texas

Before REAVLEY, GARWOOD, and DAVIS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

February 6, 1989

ISSUED AS MANDATE: MAR 20 1989

A true copy
Test:
Clerk, U.S. Court of Appeals, Fifth Circuit

By Karen L. Comeaux
Deputy
New Orleans, Louisiana MAR 20 1989

OP-JDT-9C
Rev. 4/85

IN THE
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No. 87-1875

ALTHEUS RICHARDSON, ET AL.,

Plaintiffs-Appellants,

GILBERTO MIRANDA, ET AL.,

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versus

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Appeal from the United States District Court for the Western District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion February 6, 5 Cir., 1989, ___ F.2d ___)

(March 8, 1989)

Before REAVLEY, GARWOOD, and DAVIS, Circuit Judges.

PER CURIAM:

(✔) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc

(Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-8

Supreme Court, U.S.
FILED
SEP 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2009

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CORRECTED COPY

ALTHEUS RICHARDSON, *et al.*,
Petitioners

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1989

No. 88-2009

ALTHEUS RICHARDSON, *et al.*,
Petitioners

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioners contend that the common law of Texas imposes a duty on trade unions acting in their capacity as exclusive representatives pursuant to § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), to inform bargaining unit members before they exercise their right to strike under § 7 of the Act, 29 U.S.C. § 157, of certain rights which the NLRA has been construed to confer on employers in instances of economic as opposed to unfair labor practice strikes. They further contend that this duty is breached if a trade union negligently fails to do so. And they finally contend that this case was improperly removed from state court because the

federal duty of fair representation does not preempt state law from the regulation of trade unions in the performance of their duties as exclusive § 9(a) representatives with respect to the core NLRA function of conducting economic strikes.

Petitioners do not cite a single decision of either the Court or any Circuit that supports any of these three propositions. The omission is not accidental. Each is contrary to well-settled law of the Court as uniformly understood by the federal judiciary.[1] As we show below, the petition for writ of certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

Petitioners-Plaintiffs, 55 Phelps Dodge employees who were permanently replaced during an unsuccessful economic strike, commenced this action on April 6, 1987, in the District Court of El Paso County, Texas, with the filing of a petition against Respondent-Defendant United

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[1] While the federal courts are in complete agreement that, as a general principle, the federal duty of fair representation preempts the use of state law to define the standards of conduct for a union in its performance as exclusive bargaining representative under § 9(a), there is a conflict between the United States Courts of Appeals and the Idaho Supreme Court concerning the applicability of that principle to one discrete facet of a union's representational activities. As described in the petition of the Steelworkers in *United Steelworkers of America v. Rawson*, No. 89-322 (filed August 24, 1989), the Idaho Supreme Court has carved out an exception to the rule of preemption and has held that the federal duty of fair representation does *not* preempt state tort law that would hold a union liable for workplace injuries allegedly caused by its negligent administration and enforcement of the safety provisions of a collective bargaining agreement. For reasons stated in that petition for certiorari, the Idaho Supreme Court's decision merits review by this Court. The administration of a contract related to safety, however, is not at issue in the present case, and the precise conflict described in the *Rawson* petition does not undercut the unanimity of the federal courts on the question presented in this case.

Steelworkers of America, AFL-CIO-CLC. The petition alleged in relevant part: [2]

> "Between July 1, 1983, and April 5, 1985, *Defendant acted as bargaining agent for Plaintiffs* in connection with their employment by the Phelps Dodge Refinery in El Paso, Texas. *As the bargaining agent for Plaintiffs, Defendant had a duty* to advise them of measures which their employer could, and in reasonable probability would, take, should members of the bargaining unit (including Plaintiffs and others) either vote to reject their employer's final offer or vote to go out on strike. Among the employer's rights in this dispute was the right to put into effect its final offer after bargaining to impasse, and to hire permanent replacements in the event of a strike. Defendant, without legal justification or excuse, failed to advise plaintiffs that their employer had these rights. Thereafter, the employer exercised these rights, and all Plaintiffs were permanently replaced by the employer. Had Plaintiffs known that their employer had the rights which it in fact had, they would have either persuaded the other members of the bargaining unit to vote in favor of the employer's final offer, and if that had failed, then Plaintiffs would have accepted the final offer individually.
>
> . . . .
>
> The cause of action herein accrued on the 5th day of April, 1985, when Defendant informed Plaintiffs that Defendant no longer represented them. . . ." (App. 2-3, emphasis added by Court of Appeals).

The petition, which was silent as to whether Petitioners based their claim on federal or state law, was served on Respondent on May 6, 1987. (App. 3). Respondent removed the case pursuant to 28 U.S.C. § 1441 to the

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[2] A civil action is commenced in Texas by the filing of a petition, which pleading is the equivalent of a complaint. See: Tex.R.Civ. Proc. 22, "a civil suit in the District or County Court shall be commenced by a petition filed in the office of the clerk."

United States District Court for the Western District of Texas on May 20. (*Id.*).[3] On that same date, Respondent filed a motion to dismiss the complaint on the ground that Petitioners' action was a claim for breach of the federal duty of fair representation, which claim was time-barred under the six month limitations period of § 10(b) of the NLRA, 29 U.S.C. § 160(b).

On May 26, 1987, Petitioners filed both a motion to remand and a response to the motion to dismiss, arguing that their claim was for breach of a Texas common law duty of negligence and that such claim was entitled to either a two-year or four-year state limitations period. (App. 4). During the pendency of the respective motions to dismiss and remand, fourteen additional persons sought to intervene, asserting that their claims were identical to those of the original Petitioners-Plaintiffs. (*Id.*)

Thereafter, the District Court granted Respondent's motion to dismiss, holding that Petitioners' putative state claim was a time-barred federal claim for breach of the duty of fair representation, and denied both the motion to remand and the motion to intervene. (App. 4, 5).[4]

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[3] The original removal petition had stated that federal jurisdiction over the fair representation claim was conferred by § 301 of the Labor-Management Relations Act, as amended, 28 U.S.C. § 185. (App. 3). On May 29, 1987, Respondent moved to amend its petition for removal and tendered an amended petition alleging federal jurisdiction based on 29 U.S.C. § 159(a), 28 U.S.C. § 1331, and 28 U.S.C. § 1337. (*Supra*, 4). The District Court granted leave to file the amended petition, noting that Respondent had timely moved within the thirty-day period provided by 28 U.S.C. § 1446(b). (*Id.*)

[4] Respondents' motion to dismiss was initially granted in an order of dismissal entered on October 13, 1987, which order did not explicitly rule on either the motion to remand or the motion to intervene. (App. at 5, fn.1). Subsequently, the District Court entered on November 7, 1987, an amended order of dismissal granting the motion to dismiss and denying the other two motions. (*Id.*)

On appeal, the Fifth Circuit affirmed in an opinion issued on February 6, 1989. (App. 1-19). The Court of Appeals began its analysis with the words of the petition itself, which explicitly pleaded that Respondent was the "bargaining agent" for Petitioners and that "as the bargaining agent for [Petitioners], [Respondent] had a duty to advise them" before they voted to reject the employer's final offer and engage in a strike that an employer had the right to both implement its final offer after bargaining to impasse and permanently replace economic strikers. (*Supra*, 5-6). These words, it recognized, implicated a single duty: the federal duty of fair representation, the sole duty placed on a trade union by virtue of its certification as exclusive bargaining agent pursuant to § 9(a) of the NLRA. (*Supra* at 6). And the Court of Appeals further realized:

> "In *Vaca v. Sipes*, 386 U.S. 171, . . . (1967), *the Court further held that this federal duty of fair representation preempted state substantive law* (though it did not preclude state court jurisdiction). *Id.* 87 S.Ct. at 916-18. As the Court stated: plaintiff's 'complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action.' *Id.* at 910. The Court explained that this uniform federal standard struck the proper balance between the union's need for discretion when acting as the representative of all the bargaining unit members and the individual's right to be treated fairly. *Id.* at 918. Because the plaintiffs in this case alleged that the Union breached a duty that arose from its status as their exclusive collective bargaining agent under the NLRA, *Vaca* requires that this duty be defined by the federal law. 'It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.' *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 1920, 29 L.Ed.2d 473 (1971). We

> thus find no error in the district court's characterization of plaintiffs' claims as NLRA duty of fair representation claims. *See Johnson v. Intern. Union Local No. 23*, 828 F.2d 961, 967 (3d Cir. 1987)." (Emphasis added, footnotes omitted).

This being so, the Circuit deemed Petitioners' state claim for common law negligence to be preempted by the federal duty of fair representation. (App. 9-10). It then held:

> "Because this is a duty of fair representation case, the six month limitations period of section 10(b) of the NLRA applies, *Delcostello* [*v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983)], 103 S. Ct. 2281, and plaintiffs' claims, which were filed approximately two years after their claims arose, are therefore time-barred." (App. 10-11).

The Court of Appeals next took up the question of whether removal was proper under 28 U.S.C. § 1441.[5] Relying on its prior decisions in *In Re Carter*, 618 F.2d 1093 at 1104 (5th Cir., 1980), *cert. den.*, 450 U.S. 949 (1981); *Mumford v. Glover*, 503 F.2d 878 at 883 (5th Cir., 1974); and *Smith v. Local 25, Sheet Metal Workers International Association*, 500 F.2d 741 at 748 (5th Cir., 1974), the Circuit recognized that fair representation claims are implied from the grant of exclusive repre-

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[5] 28 U.S.C. § 1441 provides in pertinent part:

> "(a) . . . [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

sentation powers to unions by the NLRA, an Act of Congress regulating commerce. (App. 11-12). As such, they arise under 28 U.S.C. § 1337[6] and are removable pursuant to 28 U.S.C. § 1441.[7] (*Id.*) But the Circuit cautioned that neither this realization nor the bare proposition that the federal duty of fair representation preempts state duties of care necessarily meant that removal was proper here. This is because "under the well-pleaded complaint rule, federal preemption is generally a defensive issue that does not authorize removal of a case to federal court." (*Supra* at 13, citation omitted). The sole exceptions to this general rule are those rare instances where the preemptive power of the federal statute is so complete as to displace all state law, thus rendering any complaint, no matter its pleaded source of law, necessarily federal in nature. (*Supra* at 13-14).[8]

The prime example, the Circuit realized, of such complete displacement is § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, which was held in *Avco Corporation v. Aero Lodge No. 735, International Association of Machinists*, 390 U.S. 557 (1968), to completely preempt any state cause of action relating to a violation of a collective bargaining agreement. (App. 14). Relying on *Vaca* and *Avco*, the Court of Appeals then ascribed identical preemptive reach to the federal duty

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[6] 28 U.S.C. § 1337 provides in relevant part:

"(a) the District Courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . ."

[7] The Circuit further noted that removal would also have been proper under the broader grant of jurisdiction set forth in 28 U.S.C. § 1441, which encompasses "all civil actions arising under the Constitution, laws, or treaties of the United States."

[8] As we explain in our Argument, *infra* at 13, the state court petition, on its face, does indeed plead a federal claim and this analysis of the Court of Appeals was unnecessary to its ruling that removal was proper.

of fair representation as to state claims relating to the performance of trade unions as exclusive § 9(a) representatives:

> "We hold that where the NLRA federal law of fair representation, actionable in federal court, preempts a state law claim, the suit asserting such a claim arises under section 1337 and may be removed to federal court just as the suit asserting state law claims preempted by section 301 of the NLRA may be removed under 'Avco' and its progeny. 'Avco' recognized removal based on section 301's complete, displacing preemption of state law because of congressional intent that federal (and state) courts create and administer a comprehensive body of federal law for the court enforcement of collective bargaining agreements. *Under 'Vaca,' the NLRA duty of fair representation, for the enforcement of which a federal (and state) court action is authorized, completely preempts state law because of the congressional intent that federal law, developed to further the goal of the NLRA, entirely govern the duties which an NLRA collective bargaining representative owes, by virtue of its position as such, to the workers it represents in that capacity. We cannot conceive that Congress intended complete displacive preemption of the 'Avco' variety in the section 301 context, but not in the context of the duty of fair representation arising from a union's status as an exclusive collective bargaining agent under the NLRA."* (*Supra* at 17).

Under this rule, the Circuit concluded that the petition was properly removed since it pleaded that Respondent breached a duty owed to Petitioners by virtue of its position as their exclusive collective bargaining agent and that the only such duty is the federal duty of fair representation. (App. 17).[9]

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[9] The Circuit also denied the Petitioner-Intervenors' motion to intervene, explaining that intervention here was permissive rather

Following the issuance of the Circuit's opinion on February 6, 1989, Petitioners moved for rehearing. The motion was denied on March 8, 1989.

ARGUMENT

Petitioners are candid as to why they contend that a state duty of negligence survives the preemptive power of the federal duty of fair representation: they filed their lawsuit eighteen months too late under the teaching of *Delcostello*, and they cannot prove that Respondent's acts were arbitrary, discriminatory, or in bad faith as required by *Vaca*. These are not sufficient reasons for overturning settled federal labor law. And this law, as announced by the Court and applied by the Circuits, is uniformly in our favor as to both the preemption and removal points.

I. The Decision Of The Court Of Appeals Finding That The Federal Duty Of Fair Representation Completely Preempts And Displaces State Duties Of Care In The Regulation Of Trade Unions In The Performance Of Their Role As § 9(a) Representatives Is Consistent With Both The Decision Of The Court In 'Vaca' And The Precedent Of Other Circuits.

As the Court of Appeals recognized, the question of whether the federal duty of fair representation completely preempts and displaces state law as applied to a trade union's performance of its duties as exclusive collective bargaining representative is not an open one. It was asked and answered by the Court twenty-two years ago in *Vaca v. Sipes, supra.*

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than mandatory and that no "extraordinary circumstances" existed warranting the reversal of the District Court's "wholly discretionary" decision as to whether to allow permissive intervention. (App. 18-19). Petitioners cite no precedent in support of their argument that this decision was error. By failing to do so, they have waived this point, and we will not treat further with it in our Brief in Opposition.

In *Vaca*, as here, the petitioners contended that state common law negligence applied to trade unions performing their functions as exclusive bargaining agents. In reversing the Missouri Supreme Court, the Court held:

> "Although we conclude that state courts have jurisdiction in this type of case, *we hold that federal law governs, that the governing federal standards were not applied here*, and that the judgment of the Supreme Court of Missouri must accordingly be reversed." *Supra* at 174 (emphasis added).[10]

And that governing federal law, *Vaca* emphasized, was the duty of fair representation, which duty was created for the precise purpose of regulating union conduct undertaken pursuant to the NLRA's grant of exclusive representation status. *Supra* at 177. *Accord: Delcostello v. International Brotherhood of Teamsters*, *supra* at 164, f.14. As such, any claim that a union has acted wrongfully in its capacity as exclusive bargaining agent ". . . allege[s] a breach by the Union of a duty grounded in federal statutes, and . . . *federal law therefore governs [such] cause of action.*" *Vaca v. Sipes*, *supra* at 177, (emphasis added). In so holding, this Court made clear that the duty of fair representation preempted any and all state causes of action directed towards trade unions acting in their capacity as exclusive bargaining representatives.

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[10] In *Vaca*, the Court addressed two distinct preemption inquiries. The first was whether fair representation claims were subject to NLRA preemption because they fell within the exclusive jurisdiction of the National Labor Relations Board. It answered this question in the negative, holding that federal and state trial courts had concurrent jurisdiction over such claims. *Supra* at 176-183. The second was whether the federal duty of fair representation preempted state law from the regulation of trade unions acting as exclusive bargaining agents. The Court held that it did and that federal and state courts were to apply solely federal law. *Supra* at 174, 177.

Four years later, in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), the Court reiterated the *Vaca* holding, insisting that a state court hearing an action against a union for allegedly wrongful action taken in its capacity as exclusive bargaining agent was to apply federal not state law and was to impose liability only if the union breached its federal duty of fair representation:

> "[F]or such a claim to be made out, Lockridge must have proved 'arbitrary or bad faith on the part of the Union, 'Vaca v. Sipes,' *supra* at 193. . . . There must be substantial evidence of fraud, deceitful action or dishonest conduct. 'Humphrey v. Moore,' *supra*, 374 U.S. at 348. . . . *Whether these requisite elements have been proved is a matter of federal law.*" *Supra* at 299 (emphasis added, unofficial citations omitted).

These words of the Court in *Vaca* and *Lockridge* could not be plainer. They were followed here by the Fifth Circuit, and they have been followed by every other Court of Appeals which has taken up the issue of whether the federal duty of fair representation completely preempts and displaces state law from the regulation of unions in the performance of their duties as exclusive agents. *See, e.g., Jones v. Truck Drivers Local Union 299*, 838 F.2d 856 at 860-61 (6th Cir., 1988); *Johnson v. United Food & Commercial Workers Local 23*, 828 F.2d 961 at 967 (3d Cir., 1987); *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733 at 735-36 (6th Cir., 1985); *Peterson v. Air Line Pilots Association*, 759 F.2d 1161 at 1168-70 (4th Cir., 1985), *cert. den.*, 474 U.S. 946 (1985).[11] In short,

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[11] The duty of fair representation in *Peterson* arose under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, rather than the NLRA. As *Peterson*, noted, *supra* at 1169-71, the distinction is immaterial since the two statutes are interpreted identically on the question of whether the federal duty of fair representation wholly preempts state duties of care.

on the question of preemption,[12] the law is clear, uniform, and wholly against Petitioners.[13]

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[12] Petitioners, as they did below, argue that preemption here cannot be premised on *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), or *International Brotherhood of Electrical Workers v. Hechler*, —— U.S. ——, 107 S.Ct. 2161 (1987), because their claim against the Union does not ". . . require analysis or interpretation of a collective bargaining agreement." (Petition For Writ Of Certiorari at 7). We agree completely, but the point is irrelevant. The controlling question here is not the preemptive scope of § 301, as in *Allis-Chalmers* and *Hechler*, but rather the preemptive reach of the duty of fair representation, which exists independent of § 301. *See, Storey v. Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 at 523-234 (6th Cir., 1985); *Sinyard v. Foote & Davies Division of McCall Corporation*, 577 F.2d 943 at 947 (5th Cir., 1978). And the answer to that second inquiry is provided by *Vaca* and *Lockridge*.

[13] In characterizing Petitioners' claim as one for breach of the duty of fair representation, the Circuit, while expressing no view on the merits, relied on *Swatts v. United Steelworkers of America*, 808 F.2d 1221 (7th Cir., 1986). (App. 5-6, 7, f.5). There, the plaintiffs pleaded a claim identical to that alleged at bar: that the union had a duty to warn economic strikers that they could be permanently replaced by their employer. This failure, the plaintiffs alleged, breached the duty of fair representation. The Seventh Circuit rejected this claim out of hand, stating, "the crux of plaintiffs' complaint concerns the union's failure to give them information that was readily available to any member of the general public —that strikers sometimes lose their jobs because employers find replacements to fill their slots." *Supra* at 1224-25. Failure to provide such information, the Circuit held, did not not violate the duty of fair representation, which could be breached only by intentional, invidious, affirmative misstatements. *Supra* at 1225. To hold otherwise, the Circuit insisted, ". . . would have a chilling effect on the right to strike itself by instilling a fear of unjustifiable lawsuits." *Id.*

II. Removal Was Proper Here Because The Petition, On Its Face, Pleaded A Claim For Breach Of The Federal Duty Of Fair Representation, And Even If It Did Not, Removal Would Still Be Proper Because The Duty Of Fair Representation Has Wholly Preempted And Displaced State Law From The Regulation Of Unions In The Performance Of Their Duties As Exclusive Collective Bargaining Agents.

Petitioners' state court pleading mentioned neither negligence nor the common law of Texas.[14] Rather, without identifying any statutory or jurisdictional basis for their claim, Petitioners simply pleaded that "*as bargaining agent* for [Petitioners], [Respondent] *had a duty* to advise them" before they voted to go on strike that their employer had the right to both implement its final offer after bargaining to impasse and to permanently replace economic strikers. (App. 2-3, emphasis added). As such, the state court petition, on its face, pleaded a federal claim because we know in the wake of *Vaca* that the only duty ascribed to a union acting in its capacity as exclusive bargaining agent is the federal duty of fair representation. This being so, removal here was proper without more, and there is no need to take up, as did the Court of Appeals, the hypothetical question of whether removal would also be proper if Petitioners had explicitly relied solely on state law in their state court pleading.

But if they had, the outcome here would be the same: removal would be warranted because instances of complete preemption, such as that announced in *Vaca* with respect to the duty of fair representation, are outside the ambit of the well-pleaded complaint rule. This is because "one corollary of the well-pleaded complaint rule . . . is that Congress may so completely preempt a particular area, that any civil complaint raising this select group

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[14] Petitioners first raised their contention that their claim was for Texas common law negligence in their motion to remand and response to Respondents' motion to dismiss. (App. 4).

of claims is necessarily federal in character." *Metropolitan Life Insurance Company v. Taylor*, —— U.S. ——, 107 S.Ct. 1542 at 1546 (1987). Such necessarily federal claims, in turn, are exempt from the general understanding that the defense of federal preemption does not authorize removal because such defense ordinarily does not appear on the face of a well-pleaded state complaint. *Id.* One example of such necessarily federal claims are those grounded in § 301, and "for 20 years, this Court has singled out claims preempted by § 301 . . . for such special treatment. *Avco Corporation v. Machinists*, 390 U.S. 557 . . . (1968)." *Id.*

The rationale for *Avco* was explained by the Court in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 at 23-24 (1983), (emphasis added, footnote omitted):

> ". . . the necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *'Avco' stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.*"

As the Court of Appeals correctly recognized, relying on *Vaca* and *Lockridge*, the preemptive power of the federal duty of fair representation is as sweeping as that of § 301, wholly displacing state regulation of trade unions in the performance of their duties as exclusive bargaining agents. *Accord: Jones v. Truck Drivers Local Union 299, supra; Johnson v. United Food & Commercial Workers Local 23, supra; Maynard v. Revere Copper Products, Inc., supra; Peterson v. Air Line Pilots Asso-*

ciation, supra. (App. 16). This realization triggers the applicability of *Avco* and renders the removal here proper even if we wrongly assume Petitioners' well-pleaded complaint explicitly and solely invoked state law as the basis of their claim. *Accord: Reiss v. Brotherhood of Railway & Airline Clerks*, 629 F. Supp. 1029 at 1030 (E.P. Pa., 1986).

This realization ends the matter, but we further note that Congressional intent would be thwarted in two major respects if the duty of fair representation were not given the same preemptive reach as § 301. First, Congress, in § 9(a) of the NLRA, established a federal scheme of exclusivity, the purpose of which was to reduce industrial strife by investing unions with the power of exclusive representation, which power was to be exercised in conformance with a single federal duty, the duty of fair representation. Ascribing less than total preemptive power to that federal duty revives the possibility that trade unions would be liable for simple negligence, a result directly at odds with this Court's insistence in *Vaca* that only arbitrary, discriminatory and bad faith conduct are actionable because any higher standard of care would erode unions' crucial discretion to compromise differences with the employer and balance competing interests within the bargaining unit, thereby defeating the overarching objective of the NLRA, industrial peace. *See also, Ford Motor Company v. Huffman*, 345 U.S. 330 (1953). Second, Congress, in enacting the six-month limitations period of § 10(b) of the NLRA, made clear its insistence that labor disputes be promptly resolved. *See: Delcostello v. International Brotherhood of Teamsters*,[15] *supra.* It is this statute of limitations which all parties concede controls the fair representation claim here, and it is the Congressional policy embedded therein which Petitioners

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[15] *Delcostello* offers an additional ground for granting the duty of fair representation the same preemptive scope as § 301: claims for breach of the duty and breach of a collective bargaining agreement are often entwined in a single hybrid action. *Supra* at 164-65.

seek to defeat by arguing that they are entitled to state limitations periods four to eight times as long. That Petitioners seize upon these two *divergences* from Congressional intent as grounds for granting the writ of certiorari is the best proof of the wrongness of their arguments.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 88-2009

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALTHEUS RICHARDSON, ET AL., PETITIONERS

v.

UNITED STEEL WORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a state law claim alleging a breach of the duty owed by a union to the employees it represents as their exclusive bargaining agent is completely preempted by federal law.

2. Whether that claim is removable from state court to federal district court.

3. Whether the court of appeals erred in upholding the denial of intervention to certain fellow employees of the original plaintiffs.

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In the Supreme Court of the United States

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ALTHEUS RICHARDSON, ET AL., PETITIONERS

v.

UNITED STEEL WORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are 55 former employees of Phelps Dodge Refinery in El Paso, Texas. They were permanently replaced by their employer during the course of an economic strike. They filed suit in state court against the respondent Union, alleging (Pet. App. 2-3):

> Between July 1, 1983, and April 5, 1985, Defendant acted as bargaining agent for Plaintiffs in connection with their employment by the Phelps Dodge Refinery in El Paso, Texas. As the bargaining agent for Plaintiffs, Defendant had a duty to advise them of measures which their employer could, and in reasonable probability would, take, should members of the bar-

> gaining unit (including Plaintiffs and others) either vote to reject their employer's final offer or vote to go out on strike. Among the employer's rights in this dispute was the right to put into effect its final offer after bargaining to impasse, and to hire permanent replacements in the event of a strike. Defendant, without legal justification or excuse, failed to advise plaintiffs that their employer had these rights. Thereafter, the employer exercised these rights, and all Plaintiffs were permanently replaced by the employer. Had Plaintiffs known that their employer had the rights which it in fact had, they would have either persuaded the other members of the bargaining unit to vote in favor of the employer's final offer, and if that had failed, then Plaintiffs would have accepted the final offer individually.

The Union removed the case to the United States District Court for the Western District of Texas pursuant to 28 U.S.C. 1441.[1] Asserting that petitioners' action was based on the allegation of a breach of the federal duty of fair representation, the Union then moved to dismiss the claim as time barred under the six-month limitations period applicable to such claims under *DelCostello* v. *Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983). Pet. App. 3-4.

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[1] Section 1441 (28 U.S.C.) provides in pertinent part:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

As the Union has not sought to base removal on diversity of citizenship, only federal question removal is at issue. See Pet. App. 11.

Petitioners, in turn, moved to remand the case to the state court on the ground that their action was a claim for negligent breach by the Union of a Texas common-law tort duty and that the state statute of limitations applied. The court then granted the Union leave to amend its removal petition to allege federal jurisdiction based on Section 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. 159(a), and 28 U.S.C. 1331 and 1337. Pet. App. 4.

The district court denied petitioners' motion to remand, applied the six-month federal limitations period, dismissed the claim as time-barred, and denied the motions to intervene of 14 similarly situated employees. Pet. App. 4-5.

2. The court of appeals affirmed the district court's judgment. Pet. App. 1-19. In determining whether petitioners' action arose under state or federal law, the court noted that the original petition had described the "duty which the Union allegedly breached" as one belonging to the Union by virtue of its role "*[a]s* the bargaining agent for Plaintiffs (emphasis added)." *Id.* at 6. It "is well established," the court stated (*id.* at 7), that "a union's conduct vis-a-vis the bargaining unit members when the union is representing them" is governed by a "duty of fair representation" grounded in federal labor law. Citing *Vaca* v. *Sipes*, 386 U.S. 171 (1967), the court held that the federal duty of fair representation preempts state substantive law and that, while state courts have concurrent jurisdiction to entertain suits alleging a breach of that duty, federal substantive law applies in determining whether the duty was breached. Pet. App. 8-9. The court further noted that petitioners "did not allege any breach of a state tort duty that exists independently of the NLRA-established collective bargaining relationship, which is the central concern of the NLRA." *Id.* at 10.[2]

[2] The court observed that, like *Int'l Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851 (1987), this case did not present the question

Turning to the removal issue, the court stated that "federal preemption is generally a defensive issue that does not authorize removal of a case to federal court." Pet. App. 13. However, the court further observed that in *Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968), the Supreme Court held that state law claims alleging breach of a collective bargaining agreement were removable to federal court because they "were so wholly preempted" by Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185. Pet. App. 13-14. The court concluded (*id.* at 16):

> [W]here the NLRA federal law duty of fair representation, actionable in federal court, preempts a state law claim, the suit asserting such a claim arises under Section 1337 and may be removed to federal court just as the suit asserting state law claims preempted by section 301 of the NLRA may be removed under *Avco* and its progeny. *Avco* recognized removal based on Section 301's complete, displacing preemption of state law because of congressional intent that federal (and state) courts create and administer a comprehensive body of federal law for the court enforcement of collective bargaining agreements. Under *Vaca*, the NLRA duty of fair representation, for the enforcement of which a federal (and state) court action is authorized, completely preempts state law because of the congres-

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whether "the Union was subject to 'an independent state-law duty of care . . . arising simply from the relationship of a union to its members.' " Pet. App. 10 (quoting 481 U.S. at 864 n.5). Petitioners did not allege a duty arising from the membership relationship -- indeed the original petition did not even allege "that plaintiffs are or were members of the Union." Pet. App. 10. Rather, petitioners based their action on the allegation of "a duty arising from the collective bargaining agent's relationship under the NLRA with the bargaining unit members, who may or may not be union members." *Ibid.*

> sional intent that federal law, developed to further the goals of the NLRA, entirely govern the duties which an NLRA collective bargaining representative owes, by virtue of its position as such, to the workers it represents in that capacity.

Citing *DelCostello* v. *Int'l Bhd. of Teamsters*, *supra*, the court agreed that petitioners' duty of fair representation suit, "which [was] filed approximately two years after their claims arose, [was] * * * time-barred" under the applicable six-month limitations period. Pet. App. 10-11. The court further held that the district court did not err in denying intervention to the employees who sought to join the action. *Id.* at 17-18.

DISCUSSION

Petitioners' principal contention is that the court of appeals erred in holding that their state law claim – a claim based on breach of a duty owed by the Union as their exclusive bargaining agent – is completely preempted by a federal cause of action. Pet. 5-10. Petitioners also contend that the case was improperly removed to federal district court. However, petitioners concede (Pet. 9) that, if the state claim is completely preempted, removal is proper. Petitioners' contentions raise no issue warranting review by this Court.[3]

1. In *Vaca* v. *Sipes*, 386 U.S. at 177, the Court held that federal law governs a cause of action for breach of the

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[3] Petitioners' final contention (Pet. 11) – that the district court erred in denying intervention because "extraordinary circumstances" were present that justified permissive intervention – presents a factual issue that does not merit this Court's attention. In any event, as the court of appeals noted (Pet. App. 18 n.9), if intervention were granted, the claims of the intervenors would have been dismissed along with those of the original plaintiffs.

duty of fair representation because the "duty is grounded in federal statutes." Accordingly, the Court reversed a judgment of the state court finding that the union had violated state law in refusing to take to arbitration an employee's claim of wrongful discharge found by a state court jury to be meritorious. The Court held that, under federal law, the employee must "prove[ ] arbitrary or bad-faith conduct on the part of the Union in processing his grievance," not merely that the grievance had merit. The Court stated (386 U.S. at 192-193):

> [I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial. [4]

Here, petitioners allege a violation of a duty that is established by federal labor law: the obligation of the union as exclusive representative of employees in a bargaining unit fairly to represent all the employees in that unit. Petitioners have identified no independent source in state law of a duty owed by a union in its role as exclusive bargaining representative under the NLRA to the employees in their role as

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[4] As the Court further explained in *Amalgamated Ass'n of Street Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971), "[p]re-emption * * * is designed to shield the system from conflicting regulation of conduct." Therefore, causes of action that "define[ ] differently what sorts of * * * union conduct may permissibly be proscribed" do not survive preemption simply because they can be styled as state law claims in contract or tort rather than as claims of violations of federal standards governing labor relations.

members of the bargaining unit, nor could they do so.[5] Indeed, it is only because the union is empowered under Section 9(a) of the NLRA, 29 U.S.C. 159(a), to act as the exclusive representative of all employees in the bargaining unit that the union owes a corresponding duty to represent each member of the unit fairly.

Petitioners argue (Pet. 5-6) that preemption is unwarranted here because to preclude a state cause of action when a union gives "careless" advice in the course of representing employees would "place labor unions beyond the reach [of the] accountability for their actions" that lawyers have in giving advice to clients, and would "effectively exempt[ ]

[5] In *United Steelworkers* v. *Rawson*, 770 P.2d 794, 796 (Idaho 1989), petition for cert. pending, No. 89-322, the court held that where a union "did actively undertake" a duty to conduct safety inspections of the workplace, that duty is governed by standards imposed under state tort law, and the union could be held liable for workplace injuries allegedly caused by its negligent inspections. *Id.* at 796-797.

The Idaho Supreme Court stated that it was not necessary to "look[ ] at the Collective Bargaining Agreement to determine whether it imposes some new duty upon the union—rather it is conceded the union undertook to inspect." 770 P.2d at 796. And, contrary to the implication in the respondent's brief in opposition in this case (Br. in Opp. 2 n.1), the court nowhere stated in *Rawson* that the statutory duty of fair representation was the source of the union's duty to conduct safety inspections; rather, the court found that the union had voluntarily "undertaken" this duty. The court thus held that the plaintiffs had claimed a breach of a state duty of care that was independent of the bargaining representative/bargaining unit relationship as well as of the collective bargaining agreement, and that the issue before the court was "solely whether that inspection was negligently performed under traditional Idaho tort law." 770 P.2d at 796. The correctness of that finding is immaterial to the disposition of the instant case, where the court found that the character of the duty at issue was wholly dependent on the relationships established under federal labor law and that no independent state duty had been asserted. We therefore agree with respondent (Br. in Opp. 2 n.1) that *Rawson* does not create a conflict with the decision below.

Labor Unions from any of the legal consequences normally associated with negligence in all of the States." *Id.* at 8-9. But the purpose of preemption is precisely to preclude the State from impairing the ability of the bargaining agent properly to perform its function by imposing a higher standard of care on a union representative than that imposed under the federal labor law that defines the union's duty. As the court below explained in summarizing *Vaca*, "this uniform federal standard [of fair representation] struck the proper balance between the union's need for discretion when acting as the representative of all the bargaining unit members and the individual's right to be treated fairly." Pet. App. 8. And, as the court of appeals also noted (*id.* at 10), petitioners do not claim that the union breached any state duty of care independent of the relationship of bargaining representative to employees (such as a state law duty that might arise between any organization and its members).[6]

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[6] The court of appeals acknowledged (Pet. App. 10) that there are exceptions to the general preemption rule, such as where an independent state law duty of care regulates activity " 'deeply rooted in local feeling' " or of " 'peripheral concern of the NLRA,' " citing, *inter alia*, *Farmer* v. *Carpenters*, 430 U.S. 290 (1977). In *Farmer*, the Court held that a claim of intentional infliction of emotional distress is actionable under state tort law even though the conduct at issue grew out of alleged discrimination in union administration of a hiring hall, because the state had a substantial interest in protecting its citizens from such "outrageous" conduct and could do so without "resolution of the 'merits' of the underlying labor dispute" (*id.* at 304). However, the Court cautioned that "[u]nion discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based. * * * [I]t is essential that the state tort be either unrelated to employment discrimination,"—which is a matter regulated by federal labor law—"or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself" (*id.* at 305). Moreover, in *Farmer*, the duty to refrain from inflicting emotional distress did not depend on the character of the

Petitioners further contend (Pet. 6-7) that preemption is not appropriate here because a state cause of action would not disrupt labor management relations or require analysis or interpretation of a collective bargaining agreement. Implicit in this contention is the assumption that the preemptive effect of the federal duty of fair representation is limited to matters arising under a collective agreement. But that assumption is incorrect. It is settled that a union may breach its duty of fair representation in ways unrelated to administration of a collective bargaining agreement,[7] and there is no valid reason why the duty fairly to represent employees as delimited by federal law should be any less exclusive in such a case than in a case arising in connection with a collective agreement. The question in both instances involves the "proper balance between the union's need for discretion * * * and the individual's right to be treated fairly." Pet. App. 8. Moreover, insofar as petitioners rely on the decisions of this Court[8] and the courts of appeals[9] holding

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relationship between the employees and the union *as their exclusive bargaining representative*, and thus was not wholly a creature of the federal labor law that creates and governs this relationship.

[7] See, *e.g.*, *Lewis* v. *Local Union No. 100 of the Laborers' Int'l Union*, 750 F.2d 1368, 1376 (7th Cir. 1984); *Storey* v. *Local 327, Int'l Bhd. of Teamsters*, 759 F.2d 517, 523 (6th Cir. 1985); *Beriault* v. *Local 40, Super Cargoes & Checkers*, 501 F.2d 258, 264-266 (9th Cir. 1974). See also *Breininger* v. *Sheet Metal Workers*, No. 88-124, (Dec. 5, 1989), slip op. 11-15.

[8] See *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *Int'l Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851 (1987); cf. *Lingle* v. *Norge Division of Magic Chef*, 108 S. Ct. 1877 (1988).

[9] The three court of appeals cases cited by petitioners (Pet. 7) all involve situations where the court, relying on *Lingle*, *supra*, held that an independent state cause of action was not preempted simply because the conduct might also have created a breach of the collective agreement. *Ackerman* v. *Western Elec. Co.*, 860 F.2d 1514 (9th Cir. 1988) (handicap discrimination under state fair employment law); *Krasinski*

that federal law preempts state law claims that require analysis or interpretation of a collective bargaining agreement—but not those where resolution of the state claim is independent of the contract—that reliance is misplaced. As respondents point out in their brief in opposition (at 12 n.12), "[t]he controlling question here is not the preemptive scope of § 301 [of the LMRA], as in *Allis-Chalmers* and *Hechler*, but rather the preemptive reach of the duty of fair representation, which exists independent of § 301." Since Section 301 only encompasses suits to enforce collective bargaining agreements, the preemptive effect of that provision on a state law claim naturally turns on the relation of the claim to the collective bargaining agreement. A duty of fair representation claim, like the one asserted here, may be unrelated to any right under a collective agreement; there is thus no warrant for making the preemptive effect of such a claim turn on whether it requires analysis or interpretation of the agreement.

2. As the court of appeals acknowledged (Pet. App. 13), a case is not removable to federal district court simply because, as a matter of defense, it can be shown that it is preempted by federal law. *Caterpillar* v. *Williams*, 482 U.S. 386, 393 (1987). "[T]he plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law" (*ibid.*). But, as the Court further explained in *Caterpillar*, 482 U.S. at 393 (citation and footnote omitted):

> There does exist, however, an "independent corollary" to the well-pleaded complaint rule, * * * known as the "complete preemption" doctrine. On occasion, the

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v. *United Parcel Service*, 530 N.E.2d 468 (Ill. 1988) (malicious defamation in the course of a discharge); *Merchant* v. *American S.S. Co.*, 129 L.R.R.M. 2737 (6th Cir. 1988) (retaliatory discharge for bringing personal injury action).

> Court has concluded that the preemptive force of a statute is so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.

Thus, in *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), the Court held that a state court suit seeking injunctive relief based on breach of a no-strike clause in a collective bargaining agreement was removable to federal district court because, under Section 301 of the LMRA, federal substantive law controlled the action even though the state court had concurrent jurisdiction to apply that law. 390 U.S. at 560. The Court considered it immaterial that the Norris-LaGuardia Act would preclude the availability of injunctive relief in federal court: "[T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Id.* at 561.

As the Court explained in *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983):

> The necessary ground of decision [in *Avco*] was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action,

any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

The court of appeals correctly concluded that the *Avco* complete preemption principle is applicable here. As shown above, the only claim asserted in the complaint was that the union breached a duty owed to the employees in its capacity as their bargaining representative. But, as *Vaca* establishes, that duty is solely a creature of federal law.

To be sure, "even an 'obvious' preemption defense does not, in most cases, create removal jurisdiction;" there must be a clearly manifested congressional intent to establish a federal cause of action which could have been brought in federal court in the first instance. *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 66 (1986). But it is plain that, as employees represented by a union, petitioners have a federal cause of action against that union for breach of the duty of fair representation—a cause of action that is within original federal court jurisdiction under 28 U.S.C. 1331 and 1337. See *Breininger* v. *Sheet Metal Workers*, No. 88-124, (Dec. 5, 1989), slip op. 14 ("We have always assumed that independent federal jurisdiction exists over fair representation claims because the duty is implied from the grant of exclusive representation status and the claims therefore 'arise under' the NLRA"); see also *Lewis* v. *Local Union No. 100 of the Laborers' Int'l Union*, 750 F.2d at 1375 n.7; *Storey* v. *Local 327, Int'l Bhd. of Teamsters*, 759 F.2d at 523; *In re Carter*, 618 F.2d 1093, 1104 (5th Cir. 1980).

In sum, the court of appeals correctly concluded that petitioners' state law claim was wholly preempted by a federal cause of action and that the case was therefore properly removed to federal district court under 28 U.S.C. 1441(b). Moreover, its decision is not in conflict with decisions of this Court or those of any other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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